Duquesne Law Review

Volume 30 | Number 4 Article 13

1992

Criminal Law

Mary Ann Dilanni

CRIMINAL LAW—The United States Supreme Court has held that before a district court can sentence longer than a range set by the Federal Sentencing Guidelines on a ground not identified as one for departure in either the pre-sentence report or the pre-hearing report of the Government, FRCrP 32 requires that the court give the parties to the action reasonable notice of the possible departure and specifically identify the grounds for such departure.

Burns v United States, US , 111 S Ct 2182 (1991).

Between the years 1982 and 1988, petitioner, William Burns, in his position as supervisor of the Financial Management Section of the United States Agency for International Development, authorized the payment of agency funds into a bank account which he had opened under an alias.[1] During this period, fifty-three fraudulent payments totaling over $1.2 million were paid from the agency into the illicit account.[2] Following the Government's detection of the scheme, Burns agreed to plead guilty to a three-count information charging him with federal crimes.[3] The plea agreement stated the parties' expectation that Burns would be sentenced pursuant to the Guidelines of the United States Sentencing Commission (hereinafter "the Guidelines") within a range corresponding to an offense level of 19 and a criminal history category of I.[4] The presentence report filed by the probation officer mirrored the plea agreement in that it recommended a sentence within the Guideline range and indicated an absence of factors which would warrant a departure from the sentence range of thirty to thirty-seven

---

1. *Burns v United States*, US , 111 S Ct 2182, 2183 (1991).

2. *Burns*, 111 S Ct at 2183.

3. Id at 2184. The Government's information charged Burns with theft of Government funds, 18 USC § 641 (1948), making false claims against the Government, 18 USC § 287 (1986), and attempted tax evasion, 26 USC § 7201 (1982).

An "information" is a written accusation of a crime issued without the participation of a grand jury. Ronald N. Boyce, Rollin M. Perkins, *Criminal Law and Procedure* § 12 at 1069 (Foundation Press, 1989).

4. *Burns*, 111 S Ct at 2184. The Sentencing Reform Act of 1984, 18 USC § 3551 (1985), was passed as part of the Comprehensive Crime Control Act of 1984, Pub L No 98-473, 98 Stat 1837 (1984), and provides for a system of sentencing guidelines to be utilized by federal court judges to determine sentences based on the various offense-related and offender-related factors identified by the Guidelines of the United States Sentencing Commission. 18 USC § 3553(a)(4), (b) (1985). These Guidelines appear at 18 USC Appendix.

months.[5] Both Burns and the Government reviewed the pre-sentence report and neither party filed objections.[6] Despite the existence of the plea agreement and the recommendations of the pre-sentence report, the district court announced at the completion of the sentencing hearing that it was departing upward from the Guidelines sentencing range, and Burns was sentenced to sixty months imprisonment.[7]

Burns appealed the sentence imposed by the district court, arguing that Rule 32 of the Federal Rules of Criminal Procedure (hereinafter "Rule 32") obliged the court to furnish advance notice to the parties of its intent to depart from the Guidelines.[8] The Court of Appeals for the District of Columbia Circuit affirmed the sentence,[9] stating that Rule 32 does not contain express language requiring advance notice of a sua sponte[10] departure by a district court, and that the imposition of such a requirement in the absence of such statutory language would be inappropriate.[11]

The Supreme Court granted certiorori, noting that several other circuits had interpreted Rule 32 as requiring a district court to provide notice of a sua sponte departure upward from the applicable Guidelines sentencing range.[12] In a five to four decision, the

---

5. *Burns*, 111 S Ct at 2184. FRCrP 32(c)(2) requires that a probation officer prepare a pre-sentence report and submit it to the court before the imposition of sentence. The report must contain a classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to Section 994(a) of title 28 that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant pursuant to 28 USC § 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances. FRCrP 32(c)(2).

6. *Burns*, 111 S Ct at 2184.

7. Id.

> The district court set forth the following three reasons for the departure: (1) the extensive duration of [Burns'] criminal conduct; (2) the disruption to governmental functions caused by [Burn's] criminal conduct; and (3) [Burns'] use of his tax evasion offense to conceal his theft and false claims offenses.

Id.

8. Id.

9. 893 F2d 1343, 1348 (DC Cir 1990).

10. "Sua sponte" is a Latin term meaning "of his or its own will; voluntary; without prompting or suggestion." *Black's Law Dictionary* 742 (West, 5th ed 1983).

11. *Burns*, 111 S Ct at 2184. The court of appeals did not interpret the language of FRCrP 32(a)(1), which requires "an opportunity to comment upon . . . matters relating to the appropriate sentence," as a directive to a district court to provide advance notice of a sua sponte departure from the Guidelines. Id.

12. Id. The Court cited the following circuit court cases which had read the notice requirement into Rule 32: *United States v Palta*, 880 F2d 636, 640 (2d Cir 1989); *United*

Court reversed the decision of the appellate court,[13] focusing on the issue of whether Congress, in enacting the Sentencing Reform Act, intended that a district court be free to depart upward from the Guidelines on its own initiative and contrary to the expectations of the parties without advance notice of such a departure.

Writing for the majority, Justice Marshall began his analysis with a brief review of the federal sentencing process prior to the Sentencing Reform Act of 1984.[14] In establishing the Federal Sentencing Guidelines, Justice Marshall noted that Congress had removed the discretionary power of individual judges to impose sentences on a case-by-case basis because of the "unwarranted disparities and . . . uncertainty" associated with indeterminate sentencing.[15] Under the Guidelines, judges now determine sentences based on the various offense- and offender-related factors identified by the Guidelines, and a finding of aggravating or mitigating circumstances not taken into account by the Guidelines allows the only opportunity for variance from their "mechanical dictates."[16] The Court pointed out that in order to achieve Congress' goal of assuring certainty and fairness in sentencing, certain procedural reforms were needed, including amendments to Federal Rule of Criminal Procedure 32.[17]

In explaining the amendments to Rule 32 by the Sentencing Reform Act in order to effectuate the goals of Congress, the majority opinion emphasized the role of a "focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence."[18] The Court cited the various procedural steps to be taken under Rule 32 to substantiate the proposition that the Rule allows for a full adversarial testing of the issues involved with sentencing.[19] Chief among these requirements

---

States v Nuno-Para, 877 F2d 1409 (9th Cir 1989); *United States v Otero*, 868 F2d 1412, 1415 (5th Cir 1989). *Burns*, 111 S Ct at 2184 n 1.

13. *Burns*, 111 S Ct at 2184.

14. Id. The Sentencing Reform Act appears at 18 USC § 3551. See note 4.

15. *Burns*, 111 S Ct at 2184. The term "indeterminate sentencing" generally means a sentence that involves incarceration for a flexible period of time. The judge fixes a maximum and minimum term, and the actual amount of time to be served is determined by an administrative agency such as a parole board. Frederick A. Hussey, David E. Duffee, *Probation, Parole and Community Field Services* 107 (Harper & Row, 1980).

16. *Burns*, 111 S Ct at 2184-85.

17. Id at 2185.

18. Id.

19. Id at 2185-86. FRCrP 32(c)(2) directs the probation officer to prepare a pre-sentence report addressing all matters germane to the defendant's sentence. FRCrP 32(c)(3)(A) and (C) provide that the report must be disclosed to the parties at least ten days before the

is the text of Rule 32(a)(1), which affords the parties the express right "to comment upon . . . matters relating to the appropriate sentence."[20]

The Government argued that Rule 32 does not contemplate a notice requirement where a district court has decided to make a sua sponte departure upward. In making this argument, the Government relied on the fact that notice is specifically provided for in other sections of Rule 32.[21] The Government reasoned that, because an express notice requirement does not exist regarding a sua sponte departure by the court, Congress intended to deny the parties notice of this possibility.[22]

The majority found the Government's argument unconvincing in light of the provision in Rule 32(a)(1) allowing the parties the opportunity to comment upon matters relating to the appropriate sentence.[23] In the Court's opinion, the Government's reading of Rule 32 rendered the express right to comment upon the terms of sentence meaningless because "the right to be heard has little reality or worth unless one is informed."[24] The Court cautioned that an inference should not be drawn from congressional silence when it is contrary to the textual and contextual evidence of congressional intent.[25]

The majority opinion went on to cite two additional reasons for its disagreement with the Government's analysis. First, the Court pointed out that the inference which the Government drew from congressional silence with regard to sua sponte departures was inconsistent with the Rule's purpose of promoting focused, adversarial resolution of the issues related to a criminal sentence.[26] The Justices believed this was so because the parties, not knowing the basis for departure, would not be afforded the opportunity to prepare a rebuttal to the court's grounds for departure. The sentence

---

sentencing, affording the parties an opportunity to file responses or objections. FRCrP 32(a)(1) provides that at the sentencing hearing the court must afford the parties an opportunity to comment upon the presentence report and on other matters relating to the appropriate sentence.

20. Id at 2186, quoting FRCrP 32(a)(1).

21. *Burns*, 111 S Ct at 2186. Specifically, the Government argued that 32(c)(3)(A) mandates a ten-day notice to the parties regarding the contents of the pre-sentence report. Id.

22. Id.

23. Id. See notes 19 and 20.

24. *Burns*, 111 S Ct at 2186, citing *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 (1950).

25. *Burns*, 111 S Ct at 2186.

26. Id at 2187.

would then be imposed, untested by the adversarial process contemplated by Congress.[27] Secondly, raising a due process concern, the Court indicated that the meaning attached by the Government to Congress' silence in Rule 32 was opposite to the meaning the Court had attached to silence in a number of similar settings.[28] In support of this contention, the Court cited decisions where silence had been interpreted to afford both notice and a meaningful opportunity to be heard[29] and likewise where the Court had inferred other statutory protections essential to assuring procedural fairness.[30] Further expanding on the due process issue, the Court explained that if they were to read Rule 32 as dispensing with notice, they would then be faced with the serious question of whether notice in this setting is mandated by the Due Process Clause.[31] The Court reasoned that the interpretation it had afforded Rule 32 was in harmony with the enduring principal of law that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems, unless such construction is plainly contrary to the intent of Congress."[32]

Based on the above analysis, the Supreme Court held that before a district court could depart upward on a ground not identified for upward departure, either in the pre-sentence report or in a prehearing submission by the Government, Rule 32 requires that the district court give the parties reasonable notice that such a ruling is contemplated.[33] The Court concluded that Burns had not received the notice to which he was entitled under Rule 32, and therefore his case was remanded to the court of appeals for further proceedings consistent with the Court's opinion.[34]

In a lengthy dissent, Justice Souter, joined by Justices O'Connor, White and Chief Justice Rehnquist,[35] chastised the majority for its failure to recognize the detail with which the Sentencing Reform Act expressly provided for procedures to be followed in imposing

---

27. Id.

28. Id.

29. *Burns*, 111 S Ct at 2187, citing *American Power & Light Co. v SEC*, 329 US 90, 107-08 (1946), and *The Japanese Immigrant Case*, 189 US 86, 99-101 (1903).

30. *Burns*, 111 S Ct at 2187.

31. Id.

32. Id, citing *Edward J. DeBartolo Corp. v Florida Gulf Coast Bldg. & Const. Trades Council*, 485 US 568, 575 (1988).

33. *Burns*, 111 S Ct at 2187.

34. Id.

35. Id at 2188. The Chief Justice joined only as to Part I of the dissent. Id.

criminal sentences under Rule 32 as amended by the Act.[36] Stating that the majority had accomplished "not a construction of the Rule, but an enlargement of it," Justice Souter in a two part analysis outlined the dissenters' disagreement with the majority's reasoning.[37]

Part I of the dissent focused on the detailed procedural requirements under the Rule, specifically the explicit notice directives required in at least three different phases of the pre-sentencing process.[38] Justice Souter reasoned that these express notice requirements appearing in Rule 32 reflect Congress' disinclination to rely on implied notice requirements.[39] Additionally, Part I of the dissent pointed out that the absence of specific notice did not render meaningless the opportunity of the defendant to comment on matters relevant to sentencing. This is because the Sentencing Reform Act itself provides that a court may depart from the applicable Guideline range in the event of aggravating or mitigating circumstances not adequately addressed by the Guidelines.[40] This puts the parties on notice that departure is always a possibility and allows counsel to gear a portion of its argument toward departure.[41]

Part II of the dissent rebutted the majority's proposition that failing to find a notice requirement under Rule 32 in the face of a sua sponte departure by a district court from the Guidelines raised a serious due process question.[42] The dissent concluded that Rule 32 as written does not raise due process concerns because it provides two procedures to minimize the risk that a defendant will be forced to serve an unreasonably long sentence outside the Guideline range.[43] The first of these protections is the opportunity for the defendant to be heard at the sentencing hearing, realizing that departure upward is a possibility raised by the Guidelines themselves. The second protection is the allowance for appellate review

---

36. Id.

37. Id.

38. Id at 2189-90. The three notice requirements of Rule 32 cited by Justice Souter are: (1) notice to the defense of the probation officer's determination of the sentencing classifications and guideline range applicable to the case, (2) entitlement of the defense to the pre-sentence report ten days prior to the sentencing hearing, and (3) that the court ensure that defendant's counsel has had an opportunity to read and discuss the report before a sentence is imposed. Id.

39. Id at 2189.

40. Id at 2190.

41. Id at 2190-91.

42. Id at 2191.

43. Id at 2195.

of the sentence.[44] In sum, Justice Souter concluded that the existing process under Rule 32 provides what is due without resort to the majority's notice requirement.[45]

As pointed out in the majority opinion, prior to the passage of the Sentencing Reform Act in 1984,[46] federal criminal sentencing was indeterminate.[47] Under the indeterminate system, federal law did not contain general sentencing provisions but rather specified the maximum term of imprisonment and the maximum fine for each federal offense in the section that described the offense.[48] The sentencing system was supplemented by the utilization of parole, by which a criminal offender was returned to society under the "guidance and control" of a parole officer at some point in time during the term of the sentence.[49] The amount of time actually served by an offender was determined by the United States Parol Commission, which could authorize release on a discretionary basis.[50]

The indeterminate sentencing scheme was supported by the existing conventional wisdom of the twentieth century that a criminal sentence should be designed for the purposes of rehabilitating the offender, and in the case of the dangerous offender, isolating him from society.[51] To accomplish these goals, the federal trial judge was given the widest discretion to suit the sentence disposition to the individual criminal.[52] The result of this broad discretion afforded to trial judges under indeterminate sentencing, coupled with the discretion of the Parole Board, was wide disparity in

---

44. Id at 2195-96.

45. Id at 2196.

46. See note 4.

47. Note, *Mistretta v United States: Upholding the Constitutionality of the Sentencing Guidelines*, 40 Mercer L Rev 1429 (1989). See note 16 and accompanying text.

48. S Rep No 225, 98th Cong, 1st Sess, reprinted in US Code Cong & Admin News 3182 (1984), citing 18 USC § 3651.

49. *Mistretta v United States*, 488 US 361, 363 (1989).

50. Andrew von Hirsch, Kathleen J. Hanrahan, *The Question of Parole: Retention, Reform, or Abolition?* 3 (Ballinger, 1979).

51. Andrew von Hirsch, *Doing Justice, the Choice of Punishments* (Hill and Wang, 1976). An influential piece of model legislation, the Model Sentencing Act summarized the conventional wisdom with regard to indeterminate sentencing in stating:

> Persons convicted of crime shall be dealt with in accordance with their potential for rehabilition, considering their individual characteristics, circumstances and needs. Dangerous offenders shall be identified, segregated and correctly treated in custody for as long of terms as needed.

Council of Judges, National Council on Crime and Delinquency, Model Sentencing Act, Second Edition, reprinted in 18 *Crime and Delinquency* 335 (1972).

52. Id.

criminal sentences.[53]

The so-called "Rehabilitative Ideal"[54] and the indeterminate sentence in general became the subject of intense criticism during the 1970s, when scholars and lawmakers alike questioned the role of rehabilitation in federal sentencing practice.[55] Widespread dissatisfaction led to increased Congressional attention to the sentencing issue,[56] and in 1971 the National Commission on Reform of Federal Criminal Laws conducted extensive hearings and drafted several proposals with regard to federal sentencing reform.[57] The debate in Congress continued throughout the 1970s and early 1980s, culminating in the passage of the Comprehensive Crime Control Act of 1984, which contained a section regarding sentencing reform.[58]

In passing this extensive sentencing reform legislation, Congress identified the four basic purposes of criminal sanctions as punishment, deterrence, incapacitation and rehabilitation, and codified these goals under Section 3553 of the Sentencing Reform Act of 1984.[59] The major changes in federal sentencing practice promulgated by the Act[60] included: (1) the abolishment of the Parole

---

53. S Rep No 225, 98th Cong, 1st Sess, reprinted in US Code Cong & Admin News 3182 (1984). The Senate Report cited an example of this wide disparity in noting that the average federal bank robbery sentence under indeterminate sentencing was eleven years, while in the northern district of Illinois the average sentence for bank robbery was five and one-half years. The senate report noted similar discrepancies for a number of different federal offenses documented in a landmark study by the United States Attorney's Office for the Southern District of New York.

54. The "Rehabilitative Ideal" refers to the theory that a criminal offense is merely symptomatic of an inner need or conflict of an offender, and that it is the responsibility of the criminal justice system to treat, correct and rehabilitate the offender. Hussey and Duffee, *Probation, Parole and Community Field Services* at 111 (cited in note 15).

55. Id at 114. Criticisms of the rehabilitive effort included: (1) overwhelming evidence that rehabilitative programs were ineffective in reducing the rate of recidivism among criminal offenders, (2) the contention that rehabilitation is beyond the competence of the criminal justice system, and (3) the idea that society has no right to force rehabilitation on unwilling subjects. Id.

56. Note, 40 Mercer L Rev at 1432 (cited in note 47).

57. Id.

58. Id.

59. 18 USC § 3553(a)(2) codifies the sentencing goals as follows: (1) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, (2) to afford adequate deterrence to criminal conduct, (3) to protect the public from further crimes of the defendant, and (4) to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner. Id. See note 4.

60. The changes are set forth in *Mistretta v United States*, 488 US 361, 367-68 (1989).

Commission,[61] (2) the creation of the United States Sentencing Commission to devise guidelines to be used in sentencing,[62] (3) determinate sentencing pursuant to the Sentencing Commission Guidelines, which sentences the offenders must serve in their entirety as reduced only by good-time credit,[63] (4) mandatory compliance by the courts with the guidelines promulgated by the Sentencing Commission, with discretion to depart therefrom allowed only when aggravating or mitigating circumstances existed which were not taken into consideration by the guidelines,[64] (5) a requirement that the sentencing judge state the reasons for the sentence imposed, documenting specific reasons for any departure from the applicable guideline range,[65] and (6) appellate review of the sentence.[66]

Several procedural reforms were necessary to effectuate the provisions of the Sentencing Reform Act,[67] and Rule 32 has been amended since the passage of the Act in order to facilitate the achievement of Congress' goals.[68] Two of the more substantive changes to the Rule include the amendments to Sections 32(a) regarding the imposition of sentence, and 32(c) regarding the presentence report.[69]

The amendment to Rule 32(a)(1) provides that "at the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."[70] The official comments by the Sentencing Commission explain this section as requiring the court to give the defendant and the Government an adequate opportunity to present information to the court regarding any disputed sentencing factor.[71] Additionally, the commentary states that the court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment under

61. 28 USC §§ 991, 994, 995(a)(1).
62. Id.
63. 18 USC § 3624(a), (b).
64. 18 USC § 3553(a), (b).
65. 18 USC § 3553(c).
66. 18 USC § 3742(a), (b).
67. See 28 USC § 991(b)(1)(B).
68. 18 USC, Rules of Criminal Procedure, Rule 32 (Supp 1991). Rule 32 was ammended in 1984, 1986, 1987 and 1989.
69. Id.
70. United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, Official Commentary, § 6A1.3 (1990).
71. Id.

the Guidelines and therefore must be resolved with care.[72] It is for this reason that the court must ensure that the parties have an adequate opportunity to present relevant information prior to the imposition of the sentence.[73]

The amendments to Rule 32(c) ensure that the pre-sentence report contains the information necessary for the court to make an appropriate sentencing decision under the new Guidelines and require that any aggravating or mitigating circumstances be set forth in the report.[74] The amendments also provide that the court shall provide the defendant and the defendant's counsel with a copy of the pre-sentence report at least ten days before the sentencing hearing.[75] Finally, waiver of the pre-sentence report by the defendant, which had been previously permitted under Rule 32(c), is disallowed by the amendments.[76]

In enforcing the Federal Sentencing Guidelines and the corresponding amendments to the Federal Rules of Criminal Procedure, the appellate courts of the United States have differed in their interpretations of the requirements attendant to the new system. Specifically with respect to Rule 32(a)(1), the various appellate courts have disagreed as to whether and if a defendant must receive notice of an upward departure from the Guidelines by the court in order to comply with the requirement under the Rule that the defendant be afforded an opportunity to comment "upon . . . matters relating to the appropriate sentence."[77]

This difference of opinion over the mandate of Rule 32(a)(1) with regard to notice is set against the backdrop of case law in the areas of procedural due process and interpretation of legislative intent. In 1950, the Supreme Court in *Mullane v Hanover Bank and*

---

72. Id.

73. Id.

74. FRCrP 32(c)(2)(B). See S Rep No 98-225, 98th Cong, 1st Sess (1983), reprinted in US Code Cong & Admin News 3182 (1984).

75. FRCrP 32(c)(3).

76. FRCrP 32(c)(1) now permits the judge to dispense with a pre-sentence report, but only after explaining on the record why sufficient information is already available. United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, Official Commentary, § 6A1.1 (1990).

77. For cases generally interpreting "the opportunity to comment" in Rule 32(a)(1) as requiring notice prior to the sentencing hearing of any intended upward departure by the court, see *United States v Palta*, 880 F2d 636 (2d Cir 1989); *United States v Nuno-Para*, 877 F2d 1409 (9th Cir 1989); *United States v Otero*, 868 F2d 1412 (5th Cir 1989); *United States v Cervantes*, 878 F2d 50 (2d Cir 1989). For cases contra, see *United States v Burns*, 893 F2d 1343 (DC Cir 1990), rev'd, 111 S Ct 2182 (1991); *United States v George*, 911 F2d 1028 (5th Cir 1990); *United States v Hernandez*, 896 F2d 642 (1st Cir 1990).

Trust Co.[78] set forth the enduring proposition that the fundamental requisite of due process of law is the opportunity to be heard. "This right has little reality or worth unless one is informed . . . ."[79] In applying this right to be informed, or more simply, right to notice, the Supreme Court has construed such a right even in the absence of express statutory language when the statute in question authorizes deprivations of liberty or property.[80] In *American Power & Light Co. v SEC*,[81] the Court rejected a constitutional challenge to a statute allowing for SEC dissolution of corporate entities. The contention was that the statute did not expressly provide for notice and opportunity for a hearing to security holders regarding proceedings against the corporate entity under the statute. The Court opined that despite express language requiring notice, it was fair to assume that Congress intended a requirement of notice and an opportunity to be heard in the statute.[82] The portion of the *American Power* decision pertaining to notice was in turn based on the decision in *The Japanese Immigrant Case*,[83] where the Court similarly found a notice requirement where none was present in the statute.[84]

Against this setting, the courts of appeal have been interpreting Rule 32(a)(1), as amended by the Sentencing Reform Act of 1984, and attempting to decide whether a notice provision exists despite the lack of express statutory language to that effect. In *United States v Palta*,[85] the defendant pleaded guilty to drug charges after attempting the sale of a controlled substance to a Drug Enforcement Administration agent in July of 1988.[86] The pre-sentence report upwardly adjusted the base level sentence set forth in the Guidelines corresponding to the defendant's crime. The base level sentence was increased two levels for possession of a firearm and an additional two levels for obstruction of justice by supplying a false name.[87] Under the report's recommendation, the sentencing range as per the Guidelines was set at 121 to 151 months, and the

78. 339 US 306 (1950).

79. *Mullane*, 339 US at 313.

80. *Burns*, 111 S Ct at 2187. Two such instances are *American Power & Light Co. v SEC*, 329 US 90 (1946), and *The Japanese Immigrant Case*, 189 US 86 (1903).

81. 329 US 90 (1946).

82. *American Power & Light Co.*, 329 US at 108.

83. 189 US 86 (1903).

84. *The Japanese Immigrant Case*, 189 US at 101.

85. 880 F2d 636 (2d Cir 1989).

86. *Palta*, 880 F2d at 637.

87. Id.

defendant did not contest this recommendation.[88] Despite the report's recommendation, at the close of the arguments the court announced a sentence of two concurrent terms of 25 years (300 months).[89] In holding that the the district court had unreasonably departed from the guidelines without articulating adequate grounds for the departure in violation of Section 3553(b) of the Sentencing Reform Act,[90] the appellate court summarily addressed the defendant's contention that, under Rule 32(a)(1), he was entitled to notice of any intended departure by the court and the corresponding opportunity to be heard with regard to the departure.[91] The court, citing *United States v Cervantes*,[92] opined that adequate notice and the opportunity to contest an upward departure from the guidelines are indispensible to sentencing uniformity and fairness.[93]

In *Cervantes*, the defendant entered into a plea agreement with the government after being charged with drug-related offenses.[94] At the sentencing hearing, during a sidebar with counsel, the sentencing judge indicated that he would issue a sentence within the applicable Guideline range.[95] Despite this statement, at the conclusion of the hearing the judge indicated that an upward departure was warranted and imposed a sentence nearly double the recommended Guidelines range sentence.[96] In reasoning very similar to that utilized in *Palta*, the appellate court held that the district court had not adequately articulated the grounds for upward departure as required by Section 3553(c)(2) of the Act.[97] In concluding that the defendant's sentence must be vacated and remanded for further sentencing proceedings,[98] the court expressed concern regarding an upward departure based on factors not included in

88. Id.

89. Id.

90. Id at 639. The Court explained that the defendant's misconduct, which was referred to by the district court judge at the time of sentencing, was adequately accounted for in the Guidelines and had been part of the determination of the applicable sentence included in the pre-sentence report. Id.

91. Id at 640.

92. 878 F2d 50 (2d Cir 1989).

93. *Palta*, 880 F2d at 640.

94. *Cervantes*, 878 F2d at 51. Both the plea agreement and the pre-sentence report contained a sentencing recommendation by the Government of thirty-three to forty-one months. Id.

95. Id at 52.

96. Id. The sentence imposed included sixty months in prison, five years of supervised release and a mandatory $50 assessment. Id.

97. Id at 54.

98. Id at 56.

the pre-sentence report and the denial of the corresponding opportunity to be heard.[99] In the court's opinion, the defense in this case was deprived of any opportunity to comment upon matters relating to departure, a right flowing from Rule 32(a)(1).[100]

Both the Ninth and Fifth Circuits had also interpreted Rule 32(a)(1) as requiring notice to a defendant of a possible upward departure from the applicable guidelines range prior to sentencing. In *United States v Nuno-Para*,[101] the Court of Appeals for the Ninth Circuit held that the district court violated Rule 32(a)(1) in basing an upward departure from the Guidelines on a factor not identified as a basis for departure in the pre-sentence report.[102] In explaining this requirement, the court stated that a sentencing court remains free to rely on a factor not identified in the pre-sentence report as a ground for departure, but must provide some notice of its decision to the defendant.[103] In a similar decision, the Fifth Circuit in *United States v Otero*[104] held that an upward departure by the sentencing judge, based on the purity of the cocaine which the defendant had in his possession, violated Rule 32(a)(1) because the defendant was not given notice that this may be a ground for upward departure.[105]

Other case law has not interpreted Rule 32(a)(1) as affording the defendant notice of a court's possible upward departure prior to the sentencing hearing. In *United States v George*,[106] the Fifth Circuit, ironically citing its decision in the *Otero* case, held that the questioning of defense counsel at the time of sentencing as to why a factor should not result in upward departure gave the defendant adequate opportunity to comment on "matters related to sentencing" required under Rule 32(a)(1).[107] In affirming the defendant's sentence, which was a substantial departure from the Guidelines sentence recommended in the pre-sentence report,[108]

---

99. Id at 55-56.

100. Id at 56.

101. 877 F2d 1409 (9th Cir 1989).

102. *Nuno-Para*, 877 F2d at 1415.

103. Id.

104. 868 F2d 1412 (5th Cir 1989).

105. *Otero*, 868 F2d at 1415. Neither the pre-sentence report nor any action by the court put the defendant on notice that the court may adjust the sentence upward based on the purity of the cocaine found in defendant's possession. Id.

106. 911 F2d 1028 (5th Cir 1990).

107. *George*, 911 F2d at 1029. The court questioned defense counsel regarding the fact that his client had violated the conditions of his bail by leaving the state. Id.

108. Id. The pre-sentence report recommended a sentence of fifteen to twenty-one months. The sentence imposed by the judge was fifty months imprisonment followed by

the court indicated that the defendant did not show how he was prejudiced by the timing of the notice, how he could have been assisted by additional notice or time, or that the rule in fact required such additional notice or time.[109] In a similar case, the First Circuit in *United States v Hernandez*[110] also held that questioning of defense counsel at the sentencing hearing as to a factor the court considered relevant to upward departure provided the defendant adequate notice of possible departure, even if the fact is not one which is raised by the pre-sentence report.[111] Finally, in *United States v Burns*,[112] the Court of Appeals for the District of Columbia Circuit held that although subdivision (a)(1) of Rule 32 requires the district court to afford the parties "an opportunity to comment upon . . . matters relating to the appropriate sentence" at the sentencing hearing, the Rule contains no express language requiring a district court to notify the parties of its intent to make a sua sponte departure from the Guidelines.[113] The Supreme Court granted certiori to resolve the dispute among the circuits with regard to the mandates of Rule 32(a)(1).[114]

The importance of Rule 32 as amended by the Sentencing Reform Act is most telling when viewed in light of the legislative history of the Act itself. As the majority pointed out, the purpose of the reform was to eliminate the unwarranted disparties and uncertainty associated with indeterminate sentencing and to achieve certainty and fairness in sentencing.[115] These goals were to be accomplished by limiting the discretion of sentencing judges through the promulgation of a set of sentencing guidelines.[116] The Guidelines were designed to structure the exercise of discretion in making decisions, primarily to facilitate increased knowledge as to how differences among offenders or offenses will effect sentences,[117] and to eliminate or at least lessen the number of scenarios where two defendants with similar records, found guilty of similar conduct,

---

three years of supervised release. Id.

109. Id at 1029-30.

110. 896 F2d 642 (1st Cir 1990).

111. *Hernandez*, 896 F2d at 643-44. The factor in question was the arrest of the defendant for a drug offense when he was out on bail for the crimes committed in the instant case. Although the presentence report mentioned this occurrence, it stated that no information had been identified which might warrant departure from the Guidelines. Id.

112. 111 S Ct 2182 (1991).

113. *Burns*, 111 S Ct at 2184.

114. Id.

115. Id at 2184-85.

116. S Rep No 225, 98th Cong, 1st Sess (1983).

117. Id.

are sentenced to widely disparate sentences by two different judges.[118] During consideration of the Sentencing Reform Act, the Senate Appropriations Committee specifically rejected an amendment by Senator Mathias which would have significantly expanded the circumstances under which judges could depart from the Guidelines in a particular case, thereby rendering the Guidelines more voluntary than mandatory.[119] Efforts to add such an amendment to the proposed sentencing legislation were resisted based on evidence presented to the Appropriations Committee, which indicated the failure of such voluntary guidelines systems in the states which had tried them.[120]

In view of the strong indication of a legislative intent to provide for a less disparate sentencing scheme through the reduction of judicial discretion as demonstrated above, the majority in *Burns* soundly asserted that allowing a sua sponte departure without notice to the defendant "is contrary to all other evidence of congressional intent."[121] Equally as strong is the majority's contention, pursuant to *Mullane*, that the principle that "this right to be heard has little reality or worth unless one is informed" applied to Rule 32(a)(1).[122] The opportunity to "comment upon . . . matters relating to the appropriate sentence" provided by Rule 32(a)(1) is rendered relatively worthless unless the hundreds of possible choices of items which may be relevant to sentencing under the Guidelines[123] are narrowed to the few which the court has determined are crucial. In this respect, the dissent's opinion that specific notice of a sua sponte departure by the court to a defendant "might be useful to the parties in helping them focus on specific potential grounds for departure"[124] is an understatement at best.

It seems apparent that allowing a sua sponte departure by a

---

118. Id.

119. Id. The Mathias Amendment would have permitted deviations from the Guidelines whenever a judge determined that the characteristics of the offender or the circumstances of the offense warranted deviation, whether or not the Sentencing Commission had considered such offense and offender characteristics in the development of the Guidelines. Id.

120. Id. In testimony before the Appropriations Committee, a District Attorney for Middlesex County, Massachusetts noted that voluntary guidelines in Massachusetts were completely ineffective in reducing sentencing disparities in the state because judges generally did not follow them. Id.

121. *Burns*, 111 S Ct at 2186.

122. *Mullane*, 339 US at 314.

123. United States Sentencing Commission, *Guidelines Manual*, Ch 1, Pt A, Intro 4(b), p.s.

124. *Burns*, 111 S Ct at 2191.

court, without notice to the defendant of the possibility and basis of such a departure, once again allows for increased discretion on the part of sentencing judges. Without examining the advantages or disadvantages to such a system, the majority correctly points out that this type of discretion is in direct contradiction to the legislative intent behind the Sentencing Reform Act.[125]

The more difficult argument is the issue of due process addressed by the majority. As the Court recognized, prior to the enactment of the Guidelines, "particular offense and offender characteristics rarely had a highly specific or required sentencing consequence."[126] The previous indeterminate system did not require the sentencing court to become involved in a fact-finding process because no single fact had a quantifiable effect on the sentence.[127] The court was thus free to disregard a fact relevant to sentencing even if it were proven.[128] With the advent of the Guidelines system, the courts make many sentencing determinations based on specific findings of fact, which in turn gives each finding of fact relevant to sentencing a heightened importance.[129] Commentators have pointed to this elevated emphasis on specific facts under the Guidelines as a reason for requiring greater due process protections at the sentencing phase.[130] This view is not, however, without its critics. The Justice Department asserts that greater formality in sentencing is not required simply because a fact has a measurable or quantifiable effect on a sentence, and correctly points out that under the previous indeterminate system a court made findings of fact which had a material impact on the sentence without a hearing.[131] Therefore, under the previous system, the defendant was not afforded any type of notice as to the factors upon which the sentence would be based, and a defendant's due process

---

125. Id at 2184.

126. Id at 2185, citing United States Sentencing Commission, *Guidelines Manual*, Official Commentary, § 6A1.3 (West, 1990).

127. Thomas W. Hutchison and David Yellen, *Federal Sentencing Law and Practice* 405 (West, 1989).

128. Hutchison and Yellen, *Federal Sentencing Law and Practice* at 405 (cited in note 127).

129. Id.

130. Id. See also United States Sentencing Commission, *Federal Sentencing Guidelines Manual*, Official Commentary, § 6A1.3 (West, 1990); "The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair." Id.

131. Hutchison and Yellen, *Federal Sentencing Law and Practice* at 405 (cited in note 127).

rights appear to have been at a much higher risk than the system now in question. This may be the reason for the summary treatment afforded the due process issue by the majority.[132]

The dissenting opinion, on the other hand, deals exhaustively with the due process concerns raised by the case.[133] Writing for the dissenters, Justice Souter approaches the due process issue as a question of what process is due.[134] Using the test announced by the Court in *Mathews v Eldridge*,[135] Justice Souter came to the conclusion that Rule 32(a)(1) satisfies due process requirements without demanding notice to a defendant of a sua sponte departure by the sentencing court.[136] Justice Souter noted that both parties have substantial and contrary interests with regard to the procedural protections afforded under Rule 32(a)(1).[137] He believes, therefore, that the central due process issues become the risk of error under the procedures already required and the probable value of a further notice requirement.[138]

The dissent saw this risk of error in sentencing, despite the absence of notice to a defendant of a sua sponte departure by a court, as sufficiently low and rejected the contention that any such notice requirement exists.[139] In adopting this position, the dissent argued that the conclusions of fact thought by a sentencing judge to warrant upward departure may be erroneous, but are usually "presented in the presentence report, and are subject to challenge and evidentiary resolution under Rule 32(c)(3)(A)."[140] This is precisely the issue of the *Burns* case. The factors for upward departure cited by the Court appeared in the pre-sentence report but were not emphasized as being facts which would warrant a depar-

---

132. *Burns*, 111 S Ct at 2187.

133. Id at 2191-96.

134. Id at 2192.

135. 424 US 319 (1976). The *Mathews* test is a three part inquiry, taking into consideration: (1) the private interest that will be affected by the official action, (2) the risk of erroneous deprivation of such interest through the proceedings and the probable value, if any, of additional or substitute procedural safeguards, and (3) the Government's interest, including the function involved and the fiscal and administrative burden that the additional procedural requirement would entail. *Mathews*, 424 US at 335.

136. *Burns*, 111 S Ct at 2196.

137. Id at 2193. Justice Souter identified the convicted defendant as having "a lively concern with the consequences of an erroneous upward departure." He outlined the Government's countervailing interest as one of avoiding the additional drain on judicial resources. Id.

138. Id.

139. Id.

140. Id at 2193-94.

ture.[141] Without notice that these factors were going to play a substantial role in the sentencing process, they could not be "subject to challenge and evidentiary resolution under Rule 32(c)(3)(A),"[142] as suggested by Justice Souter's dissent.

Therefore, in deciding that Rule 32(a)(1) requires notice to a defendant of a sua sponte upward departure by a sentencing court based on a factor not identified as such in the pre-sentence report or in the Government's pre-hearing submission, the Supreme Court has recognized the congressional intent to decrease sentence disparity through the utilization of the Guidelines to limit judicial discretion. In arriving at this result, the Court has done nothing more than provide the convicted defendant "the opportunity to comment upon matters relating to the appropriate sentence," which has been mandated by Congress under Rule 32(a)(1), and allude to a lurking due process problem when the dissent attempts to become the majority opinion of the future.[143]

Mary Ann DiIanni

141. Id at 2194 n 5.
142. Id at 2193-94.
143. Id at 2187.